

NTSB Order No. EA-3693

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of October, 1992

Docket SE-10033

5865

C.F.R. Part 91) in connection with a flight conducted on August 20, 1988.² However, the law judge reduced the sanction ordered by the Administrator for such alleged FAR violations from a 45-day suspension of respondent's airman certificates to one of 15 days.³

In the amended order of suspension (which served as the complaint), the Administrator alleged the following:

- "1. You are now, and at all times mentioned herein were, the holder of Commercial Pilot Certificate No. 472922333 and Flight Instructor Certificate No. 472922333.
2. On August 20, 1988, you operated Civil [A]ircraft No. N4709P, a Cessna Model 152, as pilot-in-command with a passenger on board, on a Visual Flight Rules (VFR) flight in the area of Malibu, California.
3. The aircraft was the property of Gunnell Aviation, an FAA certificated flight school.

²FAR § 91.79(a) and (b), which have since been recodified as § 91.119(a) and (b), read as follows:

"§ 91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft."

FAR § 91.9, which has since been amended and recodified as § 91.13(a), provided as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³That reduction in sanction was not appealed by the Administrator.

4. The purpose of the flight was to give flight instruction to a student pilot.

5. On the occasion of this flight, at about 1700 hours PDT, when not necessary for a takeoff or landing, you operated or caused to be operated N4709P, over a congested area of Malibu, namely Civic Center Way, at an altitude of 250 feet AGL [above ground level], descending over a Hughes Market and the Malibu Country Market, flaps down and slow speed, until it reached an altitude of about 100 feet AGL, headed toward a field just south of the Court House at 23525 Civic Center Way. When at an altitude of about 100 feet AGL over the Malibu Country Market, you began a climb out. There were many shoppers in the markets and adjacent parking lots.

6. Aircraft N4709P is a single-engine aircraft.

7. During initial climb out, in the event of an engine failure, an emergency landing could not be made without undue hazard to persons or property on the surface."

In his answer, respondent, who is acting pro se, denied the allegations set forth in paragraphs 5 and 7 of the complaint and admitted the remaining allegations stated therein. He also denied committing any of the FAR violations alleged. However, at the hearing respondent admitted to a violation of section 91.79(b).⁴ Accordingly, the Board's review of this case will be limited to a determination of whether the law judge erred in finding respondent in violation of FAR sections 91.79(a) and 91.9.

Respondent has, in connection with his appeal, contended that the evidence failed to establish that the flight in question was conducted in such a manner as to create an undue hazard to persons or property on the surface in the event that the aircraft

⁴See Tr. 181.

lost power and an emergency landing had been required. In support of this assertion, respondent maintains that an FAA aviation safety inspector who testified at the hearing indicated that the aircraft could have been landed in an open field without posing a danger to such persons or property.⁵

The Administrator has submitted a reply brief, in which he urges the Board to affirm the law judge's initial decision.

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order as modified by the law

⁵In his appeal brief, respondent also asserted that the law judge erred in quashing subpoenas directed at "2" FAA employees whom he intended to use as expert witnesses. A review of the record reveals that respondent subpoenaed one individual employed at the Minneapolis, Minnesota Flight Standards District Office (FSDO) less than two weeks prior to the hearing. That subpoena was quashed by the law judge upon motion by the Administrator. Additionally, less than one week before the scheduled hearing, respondent sought a continuance on the basis that another individual, who was employed at the Los Angeles, California FSDO, would be unable to be present to testify on that date. It does not appear that that individual was subpoenaed by respondent. The motion for a continuance was opposed by the Administrator, and that motion was denied by the law judge. In neither case did respondent relate the relevance and scope of the evidence he expected to elicit from these individuals, and in both cases the Administrator asserted--and respondent did not controvert--that such individuals had no personal knowledge of the events described in the complaint. As 49 C.F.R. § 821.20(a) requires that parties to certificate actions show the general relevance and reasonable scope of evidence they seek via subpoena and 49 C.F.R. § 9.5(a) explicitly bars FAA employees from providing expert testimony for parties other than the United States in proceedings in which the United States is involved (and permits those persons to testify only "as to facts" in such situations), we find that the law judge did not err in either of his actions. In this regard, see Administrator v. Sims and McGhee, 3 NTSB 672 (1977), affirmed 662 F.2d 668 (10th Cir. 1981).

judge, whose findings we adopt as our own.

At the hearing, a member of the air crew of the local sheriff's department testified that he had observed the flight in question while on duty in a helicopter. That deputy sheriff indicated that he first saw respondent's aircraft flying low over a knoll, and that he continued to observe it as it proceeded in a westerly direction over an open field, just beyond the Malibu Country Market.⁶ He also testified that respondent's aircraft was descending at the time, and that it was flown over the open field as low as 100 feet AGL,⁷ at an estimated airspeed of 50 knots and with flaps down, before it commenced a climbing left turn which took it in a southerly direction over the Pacific Coast Highway, the residences of Malibu Colony, the beach and, finally, the Pacific Ocean. The deputy further related that the distance from the open field to the shoreline was about one mile, and noted that respondent's altitude was approximately 200 feet AGL over the Pacific Coast Highway and 250 to 400 feet AGL over Malibu Colony. In addition, he indicated that there were many vehicles, shoppers, beachgoers, surfers and fishermen in the area

⁶The deputy related that the helicopter was on the ground with its engines running when he observed respondent's aircraft flying over the knoll, and that his partner (who was operating the helicopter) immediately took off, so that the remainder of his observation of respondent's aircraft was from the air. Tr. 58-59.

⁷The deputy noted that he had determined that respondent's altitude was 100 feet AGL at that point by both visual estimation and the altimeter reading on his helicopter, which was level with respondent's aircraft at the time. Id. 66, 77-78.

at the time of the incident.

Also testifying at the hearing was an FAA aviation safety inspector who gave his expert opinion that, based upon such information and a series of photographs of the area taken subsequent to the incident (Ex. C-4), respondent's aircraft would have created an undue hazard to persons and property on the surface had it experienced engine failure, necessitating an emergency landing, during the climbout and left turn phase of the flight.⁸

The law judge, in considering the evidence of record in its entirety, including that set forth above, found respondent in violation of FAR sections 91.79(a) and 91.9.⁹ As there was ample evidentiary support for such a determination, the Board

⁸In this regard, while the inspector indicated that it may have been possible for the aircraft to have been landed in the open field without creating a hazard to persons or property on the surface had a power failure occurred prior to the commencement of the climbout and left turn, he was steadfast in his belief that the aircraft would have posed a threat to persons and property on the surface if a loss of power experienced during the execution of that maneuver made an emergency landing necessary. Among the factors cited by the inspector in support of this conclusion were that the new flightpath took the aircraft over a congested area and that the raising of flaps associated with the climbout would have initially reduced lift, thereby diminishing the aircraft's airspeed-to-glide ratio and, thus, its ability to clear the area prior to landing without causing injury to persons or property below. See Tr. 123-24, 151-52, 157-58.

⁹In his initial decision, the law judge indicated that the establishment of operational FAR violations resulted in his finding of a § 91.9 violation on a derivative basis. Tr. 220. Such reasoning is in accord with numerous Board decisions. See e.g., Administrator v. Cory, NTSB Order EA-2767 at 6 (1988); Administrator v. Dutton, NTSB Order EA-3204 at 6-7 (1990); Administrator v. Thompson, NTSB Order EA-3247 at 5 n.7 (1991).

will not disturb it on appeal. Thus, we hold that the law judge did not err in affirming the Administrator's finding of the FAR violations alleged.

Turning to the matter of sanction, we find that the 15-day suspension of respondent's airman certificates ordered by the law judge is lenient in view of the FAR violations established, and that no further reduction in sanction is warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge, is affirmed; and
3. The 15-day suspension of respondent's airman certificates shall commence 30 days after the service of this order.¹⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).